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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States

PHILLIP G. LAWRENCE, and all other persons similarly situated,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, agency; Dirk Kempthorne, Secretary of the DEPARTMENT OF THE INTERIOR,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED

1. Can the Department of Interior ignore the imperative of the Indian Preference Act (25 USC § 472) by "blindly" applying civil service regulations [5 USC § 831.906(b)], which effectively deprives Indian firefighters on Indian Reservations of the enhanced retirement benefits [5 USC § 8336(c)(1)] to which they may otherwise be entitled.

2. Whether the Secretary of Interior can, by failing to adopt any standards by which the BIA could identify Indian employees as firefighters, thereby exclude the majority of Indian civil service firefighters on Indian Reservations from timely filing for previous years credits toward their enhanced retirement benefits. *[Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)]

3. Whether the trial court erred in ruling that evidence of few BIA Indian firefighter employees applying for enhanced retirement benefits, when, in fact, the BIA employs a majority of Indian firefighters, did not satisfy a prima facie showing of disparate impact.

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OPINION BELOW

The decision of the Ninth Circuit Court of Appeals is reported in 525 F.3d 916 (2008).

JURISDICTION

The Ninth Circuit filed its decision on May 13, 2008. This Court has jurisdiction under 28 USC § 1254 (1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

25 USC § 472. Standards for Indians appointed to Indian Office.

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, [without regard to civil-service laws,] to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions. (June 18, 1934, ch 576 § 12, 48 Stat. 986.)

5 USC § 8336(c)(1) "An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer, firefighter, or nuclear material courier, or any

combination of such service totaling at least 20 years, is entitled to an annuity."

CODE OF FEDERAL REGULATIONS INVOLVED

5 CFR § 831.906(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit must follow the procedure in paragraph (b) of this section. Except as provided in paragraph (d) of this section, the request must be made to the agency where the claimed services was performed.

5 CFR § 831.906(e) Coverage in a position or credit for past service will not be granted for a period greater than 1 year prior to the date that the request from an individual is received under paragraphs (b), (c), or (d) of this section by the employing agency, the agency where past service was performed or OPM.

5 CFR § 831.906(f) An agency head, in the case of a request filed under paragraph (b) or (c) of this section, or OPM, in the case of request filed under paragraph (d) of this section, may extend the time limit for filing when, in the judgment of such agency head or OPM, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

STATEMENT OF THE CASE

Appellant Lawrence, a Native American former employee of the Department of Interior's (Department) Bureau of Indian Affairs (BIA), fought fires for 23 years (1976-1999) on the Colville Indian Reservation. Mr. Lawrence seeks to overturn the Department's denial of 22 of these firefighting years of service from being used as credits to enhance his retirement annuity benefits in accordance with 5 USC § 8336(c)(1), which provides:

> "An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer, firefighter, or nuclear material courier, or any combination of such service totaling at least 20 years, is entitled to an annuity."

The computation of the retirement annuity benefit is computed, in part, on the length (number of years) of service devoted to firefighting. The Secretary has never adopted any qualifications or standards to identify BIA employees, mostly Indians, with firefighting duties who are entitled to apply for the retirement benefit annuity.

The Department left it to individual Indian employees to learn about the retirement benefit annuity and how to apply for the benefit even if they discovered its existence.

In 1987, civil service regulation, 5 CFR § 831.906(e), went into effect limiting the number of years of firefighting service that could be used in the computation of benefits to only one year prior to the filing of the application for benefits unless the application was filed within one year of the new regulation. An exemption from this one-year limitation applies if the applicant is able to show "he or she was prevented by circumstances beyond his or her control from making the request within the time limit," e.g. within one year of the 1987 regulation. [5 CFR § 831.906(f)]

The Department reorganized the new limitation on receiving service credits was a significant change that would negatively impact BIA employees if they were not notified of the change:

> "All personnel offices are asked to remind those employees who believe they are eligible for consideration of prior service that their requests are due no later than September 30, 1989."
>
> . . . . .
>
> "Every effort should be made to submit the evidence substantiating the request for consideration by September 30, 1989."

[*PERSONNEL MANAGEMENT BULLETIN (PMB)* No. 89-137 August 21, 1989 (ER 78)]

> "Please insure that Bureau employees who may be eligible under the special retirement provisions are again reminded of the deadline."

[*PMB*, No. 89-23, August 28, 1989 (ER 77)]

However, because the Secretary had adopted no standards or qualifications for identifying Indian firefighters, the Department's urgent *PMB's* to BIA agencies to notify employees who might qualify for enhanced retirement benefits was fruitless.

> "At this time the Bureau has no special qualification or medical standards, or a maximum entry age for firefighters."

[*PMB*, No. 88-04, March 4, 1988 (ER 187-188)]

As early as 1990, the Department acknowledged its inadequate efforts to notify employees of the entitlement to file for retirement benefits and the need to file timely. As part of this acknowledgement, the Department "apologized for the lateness of its notification due to the lack of guidance from OPM:

> "We apologize for the late issuance of this information; however, we have been in contact with OPM over the past few months regarding specific guidance. Since we have no specific guidance from OPM at this time, we are tentatively advising servicing personnel offices to accept late submissions up to November 1, 1990 from employees in Category 1 and Category 2 above. A specific statement signed by the employee should be included in the declaration or in the case file stating that specific instructions regarding the provisions of 5 CFR 831.908 had not been received in order to

> submit a timely submission of the request for service credit through September 30, 1990."
>
> "In order to protect the interests of employees affected by threse provisions, personnel offices are asked to assure that affected employees are notified."

[*PMB,* No. 90-140, September 27, 1990 (ER 269.1-.2)]

Mr. Lawrence, one of the premier[1] firefighters with the BIA during his 23 years of service, was never notified of the filing deadline and had no personal knowledge of the retirement annuity filing deadline until 12 years after the regulation's adoption.

In 1998, the Department of Interior, realizing that BIA employees were not aware of the filing deadline, went to the effort and expense to create an entire new organization. The agency was entitled the Firefighter/ Law Enforcement Retirement Team (FLERT). Its purpose was to hold workshops to notify employees who might qualify for the retirement annuity benefit of its existence, how to apply, and the necessity of applying early on to preserve bonus credits for years of service. Obviously the workshops were 11 years to late for Mr. Lawrence and all other Indian career employees.

Operating out of the Interagency Fire Center in Boise, Idaho, FLERT held a workshop on the Colville Indian Reservation in December 1998 to alert individual employees, who had firefighting duties, of the

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[1] Summary Record of Lawrence's firefighting record from 1976 through 1998. (ER 173-177)

then 11-year old, past due deadline to preserve prior years' service credits toward enhancement of their retirement annuity benefits. The workshop's personnel erroneously advised attendees that if they filed within one year of the workshop, they would be eligible for all years' prior service.

Plaintiff did, in accordance with the firefighter workshop instructions, file his application for retirement annuity benefits, within the year, seeking credit for his 23 years of firefighting service with the BIA. The Department denied 22 of Lawrence's prior year's service credits (1976-1998), "...solely...." on the basis that his application was "...untimely...." even though he had no knowledge of the annuity or the deadline for filing. The reason lack of actual notice did not constitute "circumstances beyond his control" was because of the Department's position that the filing deadline regulations were published in the *Federal Register* in 1987, and the *Federal Register* constituted constructive notice to all civil service employees. The Department's blind application of civil service rules of construction without regard to Lawrence's Indian status was unlawful.

Following receipt of Lawrence's application, the Department identified Lawrence as being in a firefighting position and immediately notified him personally that he would be subject to drug testing. *UNITED STATES GOVERNMENT MEMORANDUM* October 5, 1999 (ER 162, attached) If the Secretary was half as concerned about treating the BIA Indian employees with the preference they are to be accorded as the Department's concern over drug testing, it would

have provided individual notice to Indian employees of the retirement program and the filing deadline in a timely manner, not 12 years after the fact.

Neither the Department's decision, nor the Court's affirming of that decision, is in accordance with the law either as to the Department's statutory Indian preference responsibility, trust responsibility, or its common law duty. Additionally, the Department's action resulted in discriminatory impact to BIA Indians employees.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD DECLARE THAT BIA INDIAN EMPLOYEES WHO SPEND THEIR CAREERS FIGHTING FIRES ON INDIAN RESERVATIONS (TRUST ASSETS) ARE NOT SUBJECT TO THE BLIND APPLICATION OF CIVIL SERVICE REGULATIONS DEPRIVING THE INDIAN FIREFIGHTER OF THE RETIREMENT ANNUITY SERVICE CREDIT BENEFITS AUTHORIZED BY CONGRESS.

Phillip Lawrence is not like all other federal employees. Phillip Lawrence is a Native American employed by the Bureau of Indian Affairs who fought fires for 23 years protecting assets held in Trust by the United States for Indians. As such there cannot be a "blind transference" of Civil Service standards to him as has happened in this case to date, based on the holding in *Stern v. Dept. of Navy*, 280 F.3d 1376 (9th Cir. 2002). *Stern* held that publication in the *Federal*

Register constituted notice to a NON-INDIAN civil service employee of annuity benefit filing deadlines. In contradiction of *Stern* is the Ninth Circuit Court decision in *Preston v. Heckler,* 734 F.2d 1359, 1370 (9th Cir. 1984), relying on the Eighth Circuit Court's decision in *Ogala Sioux Tribe v. Andrus*, 603 F.2d 707, 716 (8th Cir. 1979), that "blind transference" of Civil Service standards to Indians is condemned.

> "Here, because the Secretary has allegedly not adopted separate and independent standards for Indians, we are unable to say with any certainty whether or not Preston would have met those standards."
>
> . . . . .
>
> "...Secretary has violated the Indian Preference Act by failing to adopt the statutorily mandated separate and independent standards for evaluating the employment qualifications of Indians. As a bona fide Indian applicant for the position, Preston was entitled to have her qualifications measured by those standards."

Preston, Id. p. 1365.

Although the government acknowledges that the Indian Reorganization Act of 1934 (June 18, 1934, Ch. 576, § 12, 48 Stat 986) (Indian Preference Act) 25 USC § 472 and 25 CFR Chap. 1 Pt. 5 § 5.2 was enacted and adopted for the purpose of affording Indians greater participation economically in their own affairs such purpose does not extend (full or

equal compensation for work performed) to Indian retirement compensation matters.

Petitioner contends one of the most important aspects of any Indian employee's participation in a capitalistic economic system is the matter of retirement compensation. The government's position is contrary to the Ninth Circuits holding in *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)

> "We must interpret the language of the Indian Preference Act (IPA) in light of its purpose and in light of the purpose of the comprehensive act of which it is a part. *See* Brothers v. First Leasing, 724 F.2d 789, 792 (Ninth Cir. 1984); *see e.g., Rose v. Lundy*, 455 U.S. 509, 517-18, 71 L.Ed. 2d 379, 102 S. Ct. 1198 (1982); *Turner v. Prod,* 707 F.2d 1109, 1121 (9th Cir. 1983)."

Preston, Id. p. 1370.

If the Department and courts must interpret the IPA in light of its purpose and its central purpose is to provide Indians greater participation economically in their own affairs, then preference in their hiring, transfer, etc., necessarily includes preference in qualifying Indians for the retirement benefits, which are an inherent aspect of their hire and essential to their participation economically in their own affairs.

In *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984), a dispute involving the application of civil service requirements, vis a vis the Indian Reorganization Act,

to an Indian applicant seeking employment with the Indian Health Service, the Court determined that without Indian qualifications for the position having been adopted by the Secretary the Indian applicant could not be subjected to generally applicable civil service regulations. The same holding should apply in the instant case.

The IPA requires that the failure of the Department to adopt standards and eligibility for identifying Indain firefighters and/or to provide actual notice to Indian BIA employees with firefighting experience of the filing deadline, "in light of their unique background and experience," constituted circumstances beyond their control in accordance with 5 CFR § 831.906(f).

The purpose behind the law providing for enhanced retirement annuity benefits [5 USC § 8336(c)(1)] was to encourage skilled firefighters and law enforcement officers to remain employed whereby the government could obtain the benefits of their experience and skill. Firefighters on Indian Reservations are engaged in preserving and protecting assets held in Trust for Indians. Unfortunately, all government employees were not treated the same as between law enforcement officers and firefighters regardless of their Indian/non-Indian status. As noted in the Department's March 4, 1988, *PMB* (ER 187-188), unlike law enforcement officer qualifications, which were established, the Secretary had developed no qualifications or standards for Indian firefighters let alone non-Indians.

> "At this time the Bureau has no special qualification or medical standards or a maximum entry age for firefighters."

[*PMB*, No. 88-04, March 4, 1988 (ER 187-188)]

As to who qualified as a firefighter and who did not, the standards could be the same, but they do not have to be. According to the IPA, they should not be if the Indian employee is to be given preference in hiring.

The Secretary of Interior's lack of compliance with the Indian Preference Act and 25 CFR 5.2 by not establishing separate and independent regulations for evaluating BIA Indian firefighter retirement applications with consideration of Indians "unique background and experience," "...without regard to Civil Service laws," deprived Lawrence of the preferential opportunity to receive credit for his 22 years as a premier firefighter on the Colville Indian Reservation. Lawrence, with his 23 years of fire fighting skills is the exact type person congress intended to benefit with the retirement annuity credit bonus for years of service. The same holding in *Preston, Id.*, should apply to Lawrence.

The concept of "constructive notice" does not square with the Indian's unique background and experience. Many Indians do not speak English well if at all. Indians and Alaska Natives are without actual knowledge of a *Federal Register* posting or the American jurisprudence concept of constructive notice. When fighting fires off their home

reservations, Hopi and Navajo, fire crews have their own translators with the crews. The Department gave and gives no consideration to the Indian and the preference to which they are entitled in terms of being provided actual notice of the annuity benefit and regulations affecting its award. Neither did the Department give any consideration to the Indian's "unique background and experience without regard to civil service rules."

As noted by Matt Wagers, FLERT Team Leader at the Colville Reservation workshop, the civil service regulations were applied to Indian and non-Indians alike without regard to the Indians status as Indians:

> "6 Q. Okay. But in administering the provisions that
> 7 you were to administer, you needed to be aware of BIA
> 8 personnel provisions as to who would qualify and who
> 9 would not qualify, correct?
> 10 A. Incorrect, sir. The regulations in which the
> 11 fire and law enforcement retirement program were based on
> 12 were from the CFR, and we also had direction from the
> 13 department; **but the overriding regulations that we used**
> 14 to adjudicate not only BIA, but National Park Service,
> 15 U.S. For- -- excuse me, U.S. Fish and Wildlife Service,

> 16 and Bureau of Land Management **were from the CFR, which**
> 17 **applied to all federal employees.**" (our emphasis)

(ER 244.1)

How can an Indian firefighter be held to notice, either actual or constructive, preferentially or otherwise, if the Department has no standards or qualifications by which to identify firefighters in the first instance?

Indians are to be accorded preference in all aspects of hiring, which necessarily includes the retirement benefits which Congress intends for those who are hired to or actually do fight fires, without regard to civil service regulations.

2. THIS COURT SHOULD DETERMINE THAT THE SECRETARY OF INTERIOR CANNOT PREVENT INDIAN FIREFIGHTERS FROM QUALIFYING FOR CONGRESSIONAL AUTHORIZED RETIREMENT ANNUITY BENEFITS BY FAILING TO ADOPT QUALIFICATIONS AND STANDARDS BY WHICH THE BIA CAN IDENTIFY AND NOTIFY INDIAN FIREFIGHTERS.

Ever since 5 CFR § 831.906(e) was first adopted, limiting the time period for firefighters to file in order to qualify all prior years firefighting service for computing retirement annuity benefits, the Department understood the importance of notification to BIA employees of the change.

A series of *PERSONNEL MANAGEMENT BULLETINS* issued from the Department's Office of Personnel Management (OPM), were directed to BIA agency officers on Indian reservations, concerning the importance of reminding employees "who believe they are eligible for consideration of prior years service that their requests are due no later than September 30th, 1989"

> "All personnel offices are asked to remind those employees who believe they are eligible for consideration of prior service that their requests are due no later than September 30, 1989."
>
> . . . . .
>
> "Every effort should be made to submit the evidence substantiating the request for consideration by September 30, 1989."

[*PMB*, No. 89-137, August 21, 1989 (ER 78)]

However, the *Bulletin* was useless as the Department admitted in *PERSONNEL MANAGEMENT BULLETIN* No. 88-04 March 4, 1988, that it did not know who qualified to be notified:

> "At this time the Bureau has no special qualification or medical standards or a maximum entry age for firefighters." (ER 187-188)

As late as September 1990 in *PMB*, No. 90-140 (ER 269.2) BIA offices still had not been provided

directions on how to administer the filing deadline regulation 5 CFR § 831.906(e):

> "Specifically of concern are the provisions of 5 CFR 831.906(e)..."
>
> . . . . .
>
> "We apologize for the late issuance of this information; however, we have been in contact with OPM over the past few months regarding specific guidance. Since we have no specific guidance from OPM at this time, we are tentatively advising servicing personnel offices to accept late submissions up to November 1, 1990 from employees in Category 1 and Category 2 above. A specific statement signed by the employee should be included in the declaration or in the case file stating that specific instructions regarding the provisions of the 5 CFR 831.908 had not been received in order to submit a timely submision of the request for service credit through September 30, 1990."

[PMB, No. 90-140 (ER 269.1-269.2), attached]

However, when Lawrence was first apprised of the retirement annuity benefit and service credits at the FLERT meeting in 1998, his application, asserting that he had no knowledge of and was never notified of any filing deadlines for the service credits, was rejected out of hand solely on the basis that it was untimely.

There was no compliance by the Secretary with its own policy to allow exemption from the deadline let alone acting in accordance with the IPA. Lawrence's "unique background and experience, e.g., he was and is an Indian with no experience with the *Federal Register* nor with the concept of "constructive notice" requires consideration by the Secretary. Without that consideration, Lawrence cannot be subjected to the blind transference of civil service regulations.

Even as late as 2002, it was reported that the Department still had not adopted any standards or qualifications by which to identify firefighters.

> " 'We have a huge fire fighting capability within our department and yet we only have 51 employees that are classified as fire fighters,' David Anderson, deputy director of the department's Office of Personnel Policy, told last week's Federal Executive and HR Professionals Conference, sponsored by the National Academy of Public Administration (NAPA), at the University of Maryland.
>
> 'All of the rest are additional duty (employees): biologists, range technicians, forestry technicians that on a day-to-day basis do other things, but when the fire comes along they put on a hard had and they go out and fight fires,' he said.
>
> However, DOI doesn't know how many personnel it has battling the blazes through its

> data system. The reason is that the department can only pull up the 51 fire protection specialists. It doesn't know how many biologists and other employees are involved in these efforts."

Federal Employees News Digest, Vol. 52, No. 8, September 16, 2002 (ER 185)

3. THIS COURT SHOULD RULE THAT THE IMPACT OF THE SECRETARY OF INTERIOR'S FAILURE TO ADOPT QUALIFICATIONS AND STANDARDS BY WHICH BIA EMPLOYEES CAN KNOW OF AND PROTECT CONGRESSIONALLY AUTHORIZED RETIREMENT ANNUITY BENEFITS FALLS DISPROPORTIONALLY ON INDIAN EMPLOYEES.

It is Indians who are predominately employed by the BIA. It is Indians who predominately fight fires on Indian Reservations and it is Indians who are predominately excluded from the enhanced retirement benefits intended for firefighters.

The majority of employees employed by the BIA, as a result of Indian preference hiring practices, ensures that any action or lack of action inhibiting or preventing BIA employees from applying for or to be considered for retirement annuity benefits will inherently have a disproportionate and discriminatory impact on Indian employees. Disparate impact can occur without regard to whether the impact was intentional or motivated by

illicit conduct. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

The decision of the Secretary to not adopt qualifications and standards by which to identify employees as firefighters and to not notify Indian firefighters in a manner to alert them to the filing deadline by which they had to file in order to preserve their right to claim entitlement to enhanced retirement annuity benefits necessarily targets Indians regardless of whether some non-Indians may be impacted as well. In fact, the Secretary's failure in terms of violating the Indian Preference Act impacts only Indians 100 percent.

The proof is in the pudding. Out of 246 BIA positions identified by Lawrence with job titles referring to firefighting duties as listed in the *Indian Forestry & Natural Resources National Directory—Tribal and Bureau of Indian Affairs Officers 2004* (ER 190-235), only 14 Native Americans had ever applied as of 2005. (ER 58-62). None have been approved. The Department's contention that Lawrence could not produce statistical ratios as between Indian and non-Indian to sustain his claim is disingenuous when it cannot even identify those who may supposedly qualify for firefighter status in the first instance.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

In Order to mandate that the Secretary of Interior (1) adopt criteria and/or standards to allow Indians with firefighting duties to be identified, (2) apprise Indian employees with firefighting duties, by way of actual notice, of their right to apply for congressionally authorized service credit retirement annuity benefits, and (3) accept lack of actual knowledge of the benefit and filing requirements as a "circumstance beyond the Indian employee's control" in lieu of the blind transference of civil service rules.

This remedy is necessary for substance to prevail over form in order that hundreds and possibly thousands of Indians, who have spent their careers engaged in firefighter duties, may apply for the congressionally authorized economic benefit and have their prior years of firefighting service be considered. Such a remedy will require the Secretary to act in accordance with the Indian Preference Act, the Government's Trust responsibility and thereby undo the disparate impact befalling Indian employee's within the BIA.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP G. LAWRENCE, and all other persons similarly situated,	)	No. 06-35448
Plaintiff-Appellant,	)	D.C. No. CV-04-00203-EFS
vs.	)	OPINION
DEPARTMENT OF INTERIOR, agency; DIRK KEMPTHORNE,* Secretary of The Department of the Interior,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Argued and Submitted
November 7, 2007-Seattle, Washington

Filed May 13, 2008

Before: William C. Canby, Jr., Susan P. Graber, and
Ronald M. Gould, Circuit Judges.
Opinion by Judge Canby

* Dirk Kempthorne is substituted for his predecessor, Gale Norton, as Secretary of the Department of the Interior, pursuant to FED. R. APP. P. 43(c)(2).

COUNSEL

Richard B. Price, Omak, Washington, for the appellant.

Andrew S. Biviano, Assistant United States Attorney, Spokane, Washington, for the appellees.

OPINION

CANBY, Circuit Judge:

Phillip Lawrence, a member of the Standing Rock Sioux Indian Tribe, has been employed for many years by the Bureau of Indian Affairs ("BIA"). He brought this action to challenge the denial of increased retirement benefits payable to employees whose duties included firefighting. He alleges that the BIA failed to notify him of an application deadline for retroactive reclassifications of service to reflect firefighting service. As a result of this failure, Lawrence missed the deadline and corresponding benefits were denied. In this action, he claims that the BIA's failure to notify him constituted a violation of federal trust responsibility toward Indians, a violation of the Indian Preference Act, and employment discrimination on the basis of race. The district court granted summary judgment for the BIA, and we affirm.

FACTS

Since June 1976, Lawrence has worked with the BIA as a forester and silviculturalist. The job descriptions for those positions did not specify that his duties included fire suppression. Nonetheless, during fire season, Lawrence spent much of his work-time fighting fires.

The Civil Service Retirement System grants an enhanced benefit retirement program to firefighters credited with 20 years of service. 5 U.S.C. § 8336(c)(1). In order to be credited for service as firefighters, employees like Lawrence who serve in positions not approved as firefighting positions must apply for the credit and prove that their duties included firefighting. 5 C.F.R. § 831.906(b). In 1987, the Civil Service regulations were changed so that the credit for years of firefighting would reach back only one year prior to making such an application. *See* 5 C.F.R. § 831.906(e). The change was published in the *Federal Register*. 52 Fed. Reg. 47893 (Dec. 17, 1987). Under the new regulation, existing employees would receive credit for their entire career if they filed before September 30, 1989. 52 Fed. Reg. at 47896.

In the months that followed publication of the new regulation, the BIA issued several "*PERSONNEL MANAGEMENT BULLETINS*" to agency personnel officers, superintendents, and division chiefs instructing them to pay "special attention" to the new deadline and "insure that Bureau employees who may be eligible under the special retirement provisions are

again reminded" of it. Nonetheless, Lawrence received no actual notice of the change until December 1998, when the Department of the Interior held a firefighters' and law enforcement officers' retirement workshop on the Colville Reservation where Lawrence worked. There, Lawrence was erroneously advised that if he filed a claim within one year of the workshop, the claim would cover the course of his entire career at the agency.[1]

Lawrence filed his claim on May 5, 1999. The Department determined that the request for pre-1998 service credit was barred by the one-year rule and denied that portion of the claim.[2] Title 5 C.F.R. § 831.906(f) allows the agency head to extend the time limit for filing if "the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit." The Department found that Lawrence's ignorance of the time limit did not constitute a circumstance beyond his control.

Lawrence sought review of this decision from the Merit Systems Protection Board. The Board denied his petition for review. Lawrence challenged this denial in the district court.[3] He argued, *inter alia*,

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[1] At the time this advice was given, the deadline was nine years past for full recognition of Lawrence's career firefighting services.

[2] The Department also initially denied benefits for the period after May 4, 1998, but that portion of the decision has been rescinded. That denial is not before the court.

[3] "Although appeals of Merit Systems Protection Board decisions generally must be filed in the Federal Circuit Court of Appeals, district courts have jurisdiction to review 'mixed' cases, in which

that the BIA's failure to provide him with actual and timely notice of the 1987 regulation limiting claims violated the BIA's obligations to Lawrence under the federal trust responsibility toward Indians, violated the Indian Preference Act, and constituted unlawful employment discrimination in violation of Title VII. The district court rejected these arguments and granted summary judgment against Lawrence, who brought this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

We review a grant of summary judgment de novo, viewing the agency's decision from the same position as the district court. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). A court reviewing a decision of the Merit Systems Protection Board must "set aside any agency action, findings, or conclusions found to be--

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence . . . ."

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an action involves both a Merit Systems Protection Act appeal and a discrimination claim." *Coons v. Sec'y of the U.S. Dep't of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (citing 5 U.S.C. § 7703(b)(2)).

5 U.S.C. § 7703(c); *see Coons*, 383 F.3d at 888. An employee asserting Title VII discrimination claims in such review is entitled to trial de novo of that claim. 5 U.S.C. § 7703(c).

[1] Under generally applicable civil service law, the government did not waive the time limit of 5 C.F.R. § 831.906(e) by failing to provide actual notice of the new time limit to current employees. *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1384-85 (Fed. Cir. 2002). As *Stearn* provides, publication in the *Federal Register* suffices as constructive notice to Lawrence of the limitations period. *Id.* Although the regulation does provide for waiver when the employee is "prevented by circumstances beyond his or her control from making the request within the time limit," 5 C.F.R. § 831.906(f), no such circumstances were present in this case.

[2] The federal government's trust responsibility toward Indian tribes does not change the rule. This is not a case where the United States holds assets in trust for a tribe and has a fiduciary obligation to provide actual notice to beneficiaries of their claims. *See Loudner v. United States*, 108 F.3d 896, 900-01 (8th Cir. 1997). The agency discharged its fiduciary obligations by complying with the Civil Service Regulations, which are "general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). The agency's failure to provide employees with actual and timely notice of the regulatory change is regrettable- particularly in light of the agency's repeated written instructions to

supervisors to provide such notice-but trust doctrine imposes no special notice obligation beyond that enunciated in *Stearn*.

[3] Lawrence fares no better under the Indian Preference Act. The text of this act accords Indians a preference in "hiring," 25 U.S.C. § 472, and the BIA has interpreted "hiring" to mean "initial hiring, reinstatement, transfer, reassignment or promotion." 25 C.F.R. § 5.2(a). This preference of 25 U.S.C. § 472 supersedes the otherwise "blind" application of the Civil Service Regulations in the hiring of Indians. *See Preston v. Heckler*, 734 F.2d 1359, 1370-71 (9th Cir. 1984). Lawrence argues that the word "reassignment" extends to retroactive recognition that his employment included firefighting for benefits purposes, and that the preference accordingly applies here. While "statutes enacted for the benefit of Indians must be liberally construed with all doubts resolved in favor of the Indians," *id.* at 1369, we cannot read "hiring" or "reassignment" so broadly as to include a retroactive recognition that Lawrence's duties included firefighting. The Merit Systems Protection Board therefore did not act arbitrarily or contrary to law in holding that the limited imperatives of the Preference Act do not apply to this case. With regard to the matter in issue, the regular provisions of the Civil Service Regulations govern Lawrence as they do any other employee.

[4] Finally, the district court did not err when it granted the Department's motion for summary judgment on Lawrence's disparate impact claim. *See* Civil Rights Act of 1964 § 717(a), *as amended*, 42

U.S.C. § 2000e-16. Lawrence failed to make a prima facie showing of disparate impact, which is "usually accomplished by statistical evidence showing that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." *Stout v. Potter,* 276 F.3d 1118, 1122 (9th Cir. 2002) (internal quotation marks omitted) (quoting *Robinson v. Adams*, 847 F.2d 1315, 1318 (9th Cir. 1988)). Lawrence presented evidence that the BIA's policy affected some Indian employees, but he presented no evidence that the failure to provide actual and timely notice disproportionately affected Indians more than other racial groups.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP G. LAWRENCE, et. al,	) No. CV-04-00203-EFS
Plaintiffs,	) ORDER GRANTING IN PART AND HOLDING IN ABEYANCE IN PART
v.	) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
DEPARTMENT OF INTERIOR,	)
Defendant.	)

Before the Court, without oral argument, is the Department of Interior's Motion for Summary Judgment (Ct. Rec. 18). After reviewing the submitted materials and considering relevant authority, the Court is fully informed on the issues raised and hereby **grants in part** and **holds in abeyance in part** the Department of Interior's motion.

I. Background

Plaintiff Phillip G. Lawrence has been employed by the Department of the Interior (the "Department") since June 13, 1976, as a forrester and been enrolled in the Civil Service Retirement System during this period. On May 5, 1999, the Department received Plaintiff's request for 5 U.S.C. § 8336(c) enhanced firefighter retirement annuity benefits ("enhanced benefits"). Plaintiff's request sought retroactive enhanced benefits from the initial date of his

employment, with coverage continuing while employed. On April 5, 2002, the Department denied Plaintiff's request in a two-part letter. In Part I, Plaintiff was denied enhanced benefits from June 13, 1976, to May 4, 1998, one-year prior to Plaintiff's request, based on the Department's conclusion that Plaintiff's request was untimely. In Part II, the Department denied Plaintiff's request for enhanced benefits after May 5, 1998, following its finding Plaintiff was not qualified to receive enhanced benefits.

Plaintiff appealed the Department's denial of benefits to the Merit Systems Protection Board ("MSPB"), filing a Narrative Claim on June 28, 2002. On September 27, 2002, pursuant to an agreement with presiding Administrative Judge James H. Freet, the Department rescinded Part II of its April 5, 2002, decision. The Department's rescission was intended to limit Plaintiff's appeal to the Department's denial of benefits from June 13, 1976, to May 4, 1998. Consequently, Judge Freet did not consider whether Plaintiff was entitled to enhanced benefits after May 4, 1998, and limited his decision to determining whether the Department's denial of enhanced benefits prior to May 5, 1998, was proper.

On June 26, 2003, Judge Freet issued the MSPB's Initial Decision, in which the Department's pre-May 5, 1998 denial of benefits, due to Plaintiff's untimely filing, was affirmed. Subsequently, Plaintiff petitioned the MSPB for review of Judge Freet's decision. Plaintiff's petition for review was denied in a Final Order issued on May 24, 2004, in which the

MSPB found Plaintiff offered "no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome." (Ct. Rec. 20-6 at 2.) On November 10, 2004, pursuant to his rights to appeal the MSPB's final order, Plaintiff filed suit in the Eastern District of Washington[1] seeking review of the denial of enhanced benefits and claiming the Department had discriminated against him as a Native American by (1) denying him benefits based on his race, and (2) not notifying him of his opportunity to apply for enhanced benefits in the late-1980s when many other, non-Native American employees, received actual notification.

II. Non-Discrimination Claim

A. Standard of Review

Judicial review of MSPB final orders is governed by 5 U.S.C. § 7703(c), which requires reviewing courts to examine the administrative record and

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[1] MSPB decisions are generally reviewed by the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). However, where there is a separate claim of discrimination, the plaintiff is entitled to *de novo* review in a federal district court. *Id.* § 7703(b)(2). Moreover, if the plaintiff raises both discrimination and distinct nondiscrimination claims arising from the MSPB determination, a "mixed case," the district court has jurisdiction over both types of claims. *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). Thus, jurisdiction is proper in this Court because Plaintiff is not only seeking judicial review of the MSPB's decision, but also raises a discrimination claim.

> hold unlawful and set aside any agency action, findings, or conclusions found to be
>
> > (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (2) obtained without procedures required by law, rule, or regulation having been followed; or
> >
> > (3) unsupported by substantial evidence;
>
> except that in the case of discrimination brought under [the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16(c))], the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

B. Analysis

Plaintiff seeks enhanced benefits under 5 U.S.C. § 8336(c)(1), which provides:

> An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer, firefighter, or nuclear material courier, or any combination of such service totaling at least 20 years, is entitled to an annuity.

Federal regulations prescribe the process by which civil service employees may apply of enhanced benefits. Specifically, 5 C.F.R. § 831.906(b) states:

> An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's service should be credited and if it qualifies, whether it should be a primary or secondary position.

Furthermore, employees who believe they are entitled to enhanced benefits for past employment service, are allowed to petition the head of their employing agency for past service credit. 5 C.F.R. § 831.906(c). However, "credit for past service will not be granted for a period greater than 1 year prior to the date that the request from the individual is received . . . by the employing agency . . . .[,]" *Id.* § 831.906(e), unless the agency head extends the time period for filing, *Id.* § 831.906(f). An agency head is permitted to extend the one-year limit if an individual seeking past service credit is able to show "he or she was prevented by circumstances beyond his or her control from making the request within the time limit." *Id.*

The MSPB has determined the "beyond his or her control" standard is not met simply because a claimant did not have actual knowledge he may be eligible to receive particular enhanced benefits. *See Menendez v. Office of Personnel Mgmt.*, 83 M.S.P.R. 582, ¶ 8 (1999) ("Ignorance of a regulation itself is not a circumstance beyond the appellant's control which

prevented him from making a timely request for [enhanced benefits] coverage."). The MSPB's decision is consistent with the Federal Circuit's[2] decision in *Stern v. Department of the Navy*, in which that court held "lack of knowledge is not a ground for waiver of the time limit under 5 C.F.R. § 831.906(f)." 280 F.3d 1376, 1385 (Fed. Cir. 2002).

In *Stern*, the Federal Circuit concluded civil service employees have constructive notice of 5 C.F.R. § 831.906(f)'s one-year filing requirements by virtue of its 1987 publication in the Federal Register. *Id.* at 1384-85. For this reason, the court in *Stern* upheld the MSPB's refusal to waive the one-year past-service filing requirement, holding that even though the applicants were unaware of the enhanced benefits they were then seeking, they had "not shown that they were prevented by circumstances beyond their control from filing timely applications. . . ." *Id.* at 1385.

Relying on *Stern*, the MSPB denied Plaintiff's request for past service credit for all time one-year prior to his May 5, 1999, application for enhanced benefits. In the MSPB's initial order, Administrative Judge Freet states:

> I find that the instant case fits fully within the guidance found in *Stern*. Publication of the

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[2] All MSPB decisions are appealable to the Federal Circuit, unless a discrimination claim accompanies the nondiscriminatory request for administrative judicial review. Thus, Federal Circuit law is given great weight by the MSPB is deciding cases.

> regulations placed the [Plaintiff] on constructive notice of the retirement system and the filing requirement; he nonetheless did not file his application until 1999 and he cites no reason for this delay beyond lack of knowledge of the filing requirement.

(Ct. Rec. 20-5 at 6.) Judge Freet then considered Plaintiff's various arguments on why *Stern* was not controlling, finding none to be persuasive on the issue of timeliness. Judge Freet's decision was then adopted by the MSPB when Plaintiff's petition for the review of the Initial Order was denied in the MSPB's Final Order. The Department now asks this Court to affirm the MSPB's denial of benefits by finding its conclusion was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

For purposes of the Department's motion, it is undisputed that (1) Plaintiff did not learn about the enhanced benefits or his potential eligibility for those benefits until December 1, 1998; (2) Plaintiff thereafter applied for enhanced benefit coverage for his entire term of employment with Defendant; (3) the Department then denied those benefits for all service prior to May 5, 1998, one-year prior to Plaintiff's application, after finding his application was not timely for those earlier dates; and (4) that the MSPB, via Judge Freet's decision, upheld the Department's initial denial of benefits, relying on Stern and several MSPB decisions.

Although Plaintiff may not have had actual knowledge of the enhanced benefits program or its

filing requirements, he did have constructive knowledge via their publication in the Federal Register. Furthermore, Defendant has set forth no reason, other than his lack of actual knowledge, why he was unable to apply for enhanced benefits at an earlier date. Instead, Defendant's arguments are limited to explaining why he believes Stern should not have been relied on by the MSPB. The Court does not find Plaintiff's arguments on this point persuasive. Thus, the Court concurs with the MSPB's determination that Plaintiff's circumstances fit "fully within the guidance found in *Stern*[,]" and upholds the MSPB's decision, finding the decision was not capricious, an abuse of discretion, or otherwise not in accordance with law.

III. Discrimination Claims

To aid the Court in its consideration of the Department's request for summary judgment on Plaintiff's discrimination claims, the Court sets **a telephonic hearing for Wednesday, January 18, 2006, at 10:00 a.m**. Each party will be given **twenty (20) minutes** to provide oral argument in support of their positions as they related to the Department's motion and Plaintiff's claims of discrimination.

During the telephonic hearing, the Court asks counsel to explain, by pointing to specific evidence in the previously submitted record, whether (1) Plaintiff has met his burden under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), for defeating summary judgment, and (2) why the Department is either entitled or not

entitled to judgment as a matter of law on the discrimination claims under Federal Rule of Civil Procedure 56(c).

Accordingly, IT IS **HEREBY ORDERED**:

1. Defendant Department of Interior's Motion for Summary Judgment (Ct. Rec. 18) is **GRANTED IN PART** (Nondiscrimination Claim) and **HELD IN ABEYANCE IN PART** (Discrimination Claims).

2. The parties are to appear at a telephonic hearing to provide oral argument on the Department's Motion of Summary Judgment as it pertains to Plaintiff's Discrimination Claims on **Wednesday, January 18, 2006, at 10:00 a.m. Counsel should call into the Court's public conference line just prior to the hearing (509-376-8880). The use of mobile phones is prohibited.**

3. The Joint Pretrial Conference Order filing deadline is **extended from January 16, 2006, (see Ct. Rec. 42), to January 27, 2006**, to accommodate the Court's request for oral argument.

IT IS SO ORDERED. The District Court Executive is directed to enter
this Order and provide a copy to counsel.

DATED this 6th day of January, 2006.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP G. LAWRENCE, and all other persons similarly situated,	) No. CV-04-00203-EFS)
Plaintiff,	) ORDER GRANTING THE REMAINDER OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
v.	)
GALE NORTON, Secretary of the DEPARTMENT OF INTERIOR, and the DEPARTMENT OF INTERIOR, Agency,	)
Defendants.	)

On January 6, 2006, the Court entered an Order granting in part and holding in abeyance in part Defendants' Motion for Summary Judgment. (Ct. Rec. 45.) In that Order, the Court granted summary judgment on Plaintiff Phillip Lawrence's non-discrimination claim in favor of Defendants Gale Norton and the Department of the Interior (collectively hereafter referred to as "the Department") and set a telephonic hearing for January 18, 2006, to hear oral argument on whether the Department should also be granted summary judgment on Plaintiff's remaining discrimination claim. *Id.*

During the January 18, 2006, hearing, in addition to arguing his client's position on the discrimination claim, Plaintiff's counsel moved the Court for leave to supplement the record with three exhibits. (Ct. Rec. 48.) Plaintiff's counsel's request was granted and Plaintiff was given to February 1, 2006, to supplement the record with the three exhibits described during the telephonic hearing. *Id.* In addition, the Court ordered Plaintiff to submit a supplemental memorandum that explained how the supplemental exhibits help him avoid summary judgment on his discrimination claims. *Id.* Although no supplemental memorandum was filed by Plaintiff, Plaintiff did submit the three supplemental exhibits and a declaration by Plaintiff's counsel that briefly discusses the supplemental exhibits. (Ct. Rec. 47.) In response to the Plaintiff's supplemental filings, the Department submitted a supplemental memorandum on February 15, 2006, which discusses the supplemental exhibits' effects on its request for summary judgment on Plaintiff's discrimination claim. (Ct. Rec. 52.)

After reviewing the original and supplemental materials provided by the parties, relevant authority, and oral arguments made during the January 18, 2006, hearing, the Court is fully informed on the remaining discrimination claim issues and hereby grants the portion of the Department's Motion for Summary Judgment relating to those issues.

I. Factual Background

Plaintiff has been employed by the Department since June 13, 1976, as a forrester and enrolled in the Civil Service Retirement System during this period. On May 5, 1999, the Department received Plaintiff's request for enhanced firefighter retirement annuity benefits ("enhanced retirement benefits") as provided for under 5 U.S.C. § 8336(c).

Plaintiff's request sought retroactive enhanced retirement benefits from the initial date of his employment, with coverage continuing while employed. On April 5, 2002, the Department denied Plaintiff's request in a two-part decision. In Part I of the decision, Plaintiff was denied enhanced retirement benefits from June 13, 1976, to May 4, 1998, one-year prior to Plaintiff's request, based on the Department's conclusion Plaintiff's request was untimely. In Part II of the decision, the Department denied Plaintiff's request for enhanced retirement benefits after May 5, 1998, following its finding Plaintiff was not qualified to receive enhanced retirement benefits.

Plaintiff appealed the Department's denial of benefits to the Merit Systems Protection Board ("MSPB") by filing a Narrative Claim on June 28, 2002, claiming he was entitled to timely actual notice of his right to apply for enhanced retirement benefits and that the benefits were otherwise improperly denied. On September 27, 2002, pursuant to an agreement with presiding Administrative Judge James H. Freet, the Department rescinded Part II of

its April 5, 2002, decision. The Department's rescission was intended to limit Plaintiff's appeal to the Department's denial of benefits from June 13, 1976, to May 4, 1998, based on this alleged untimeliness. Consequently, Judge Freet did not consider whether Plaintiff was entitled to enhanced retirement benefits after May 4, 1998, and limited his decision to determining whether the Department's denial of enhanced retirement benefits prior to May 5, 1998, was proper.

On June 26, 2003, Judge Freet issued the MSPB's Initial Decision, in which the Department's pre-May 5, 1998 denial of benefits based on Plaintiff's untimely filing, was affirmed. Subsequently, Plaintiff petitioned the MSPB for review of Judge Freet's decision. Plaintiff's petition for review was denied in a Final Order issued on May 24, 2004, in which the MSPB found Plaintiff offered "no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome." (Ct. Rec. 20-6 at 2.) On November 10, 2004, pursuant to his right to appeal the MSPB's final order, Plaintiff filed suit in the Eastern District of Washington[1] seeking review of the Department's

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[1] MSPB decisions are generally reviewed by the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). However, where there is a separate claim of discrimination, the plaintiff is entitled to *de novo* review in a federal district court. *Id.* § 7703(b)(2). Moreover, if the plaintiff raises both discrimination and distinct nondiscrimination claims arising from the MSPB determination, a "mixed case," the district court has jurisdiction over both types of claims. *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). Thus, jurisdiction

denial of enhanced retirement benefits and claiming the Department had discriminated against him based on his race.

In his First Amended Complaint, Plaintiff requests injunctive relief under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., based on what he believes were discriminatory employment practices utilized by the Department to withhold the above-referenced enhanced retirement benefits from him based on his Native American race. (Ct. Rec. 13.) In his prayer for relief, Plaintiff specifically asks the Court to declare (1) the Department's refusal to find Plaintiff qualified for enhanced retirement benefits was a discriminatory practice based on Plaintiff's race and (2) the Department administered federal law and regulations to the exclusion and/or prejudice of its Native American employees, including Plaintiff, on account of those employees' race. *Id.*§ XVII. Although Plaintiff's discrimination claim is not clearly outlined in his First Amended Complaint, the Court presumes, from his two discrimination-based claims for relief, that he intends to prove Title VII liability under the two separate theories of disparate treatment and disparate impact. In its Motion for Summary Judgment, the Department seeks summary judgment on Plaintiff's discrimination claim, arguing Plaintiff is incapable of recovering under either theory of liability.

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is proper in this Court because Plaintiff has raised a discrimination claim under Title VII.

II. Summary Judgment Standard

Summary judgment will be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). When considering a motion for summary judgment, a court may not weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue for trial exists only if "the evidence is such that a reasonable jury could return a verdict" for the party opposing summary judgment. *Id.* at 248. In other words, issues of fact are not material and do not preclude summary judgment unless they "might affect the outcome of the suit under the governing law." *Id.* There is no genuine issue for trial if the evidence favoring the non-movant is "merely colorable" or "not significantly probative." *Id.* at 249.

If the party requesting summary judgment demonstrates the absence of a genuine material fact, the party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial" or judgment may be granted as a matter of law. *Anderson*, 477 U.S. at 248. This requires the party opposing summary judgment to present or identify in the record evidence sufficient to establish the existence of any challenged element

that is essential to that party's case and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to contradict the moving party's facts with counter affidavits or other responsive materials may result in the entry of summary judgment if the party requesting summary judgment is otherwise entitled to judgment as a matter of law. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

III. Analysis

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e2(a)(1). A plaintiff alleging discrimination under Title VII may prove his claim under the separate theories of disparate treatment and disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

As stated above, based on the declaratory relief sought by Plaintiff, the Court presumes Plaintiff intends to prove his Title VII claim under both theories of liability. Plaintiff's separate efforts are attacked by the Department in its Motion for Summary Judgment and recently filed supplemental memorandum. Accordingly, the Court addresses both theories to determine whether sufficient evidence exists to permit Plaintiff's discrimination claim to survive the Department's request for summary judgment.

A. Disparate Treatment

In Title VII suits based on a theory of disparate treatment, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination.[2] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). A *prima facie* case of discrimination is established by introducing evidence that gives rise to an inference of unlawful discrimination. *Id.* After a plaintiff has met his initial *prima facie* burden, a presumption arises that his employer unlawfully discriminated against him. *Id.* This presumption shifts the burden of production to the defendant to produce an explanation for its allegedly discriminatory action, i.e. show the defendant's complained of action was based on a "legitimate, nondiscriminatory reason." *Id.* at 506-07. In meeting its burden, the defendant must "clearly set forth, through the introduction of admissible evidence, reasons for its action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Texas Dep't of Cmty. Affairs, 450 U.S. 248, 254-55 (1981).

If the defendant meets its burden of production, "the presumption of unlawful discrimination 'simply drops out of the picture'" and the plaintiff is then required to persuade the trier-of-fact that the defendant's explanation for its action was merely

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[2] When considering a motion for summary judgment offered against a plaintiff in a Title VII suit, the court presumes the plaintiff has met his initial burden of establishing a *prima facie* case of disparate treatment discrimination. *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

pretext for its discriminatory motives. *Bradley*, 104 F.3d at 270 (quoting *St. Mary Honor Ctr.*, 509 U.S. at 511). In doing so, the plaintiff must produce "specific, substantial evidence of pretext." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994).

In this instance, because the Court is considering the Department's Motion for Summary Judgment on Plaintiff's Title VII discrimination claim, the Court presumes Plaintiff has met his initial burden of establishing a *prima facie* case of unlawful discrimination. *See Bradley*, 104 F.3d at 270. For this reason, the Department is presumed to have unlawfully discriminated against Plaintiff by refusing to find him qualified to receive enhanced retirement benefits and the Department is charged with producing sufficient evidence to rebut this presumption by demonstrating its refusal was based on a "legitimate, nondiscriminatory reason." *St. Mary Honor Ctr.*, 509 U.S. at 506-07.

In its effort to rebut the presumption of unlawful discrimination, the Department explains that its decision to deny Plaintiff's request for enhanced retirement benefits was solely based on its conclusion Plaintiff's request was untimely and not based, as Plaintiff suggests, on Plaintiff's race. In other words, according to the Department, had a similarly situated non-Native American employee requested enhanced retirement benefits, that request would have also been denied due to its untimeliness.

This issue was previously addressed by the Court in its January 6, 2006, Order when it concluded the

MSPB's final order affirming the Department's denial of enhanced retirement benefits to Plaintiff was not capricious, an abuse of discretion, or otherwise not in accordance with law. (Ct. Rec. 45.) Based on that conclusion, the Court granted summary judgment in the Department's favor on Plaintiff's non-discrimination claim. *Id.* For those same reasons, the Court now concludes the Department's refusal to find Plaintiff qualified for enhanced retirement benefits based on its belief Plaintiff's request was untimely, to be a legitimate and nondiscriminatory reason for its adverse action. Accordingly, the Department's burden of production has been met and the onus of producing "specific, substantial evidence" that the Department's explanation is merely pretext for discriminatory motives falls on *Plaintiff*. *Wallis*, 26 F.3d at 890.

Aside from a blanket assertion that the Department discriminated against him by refusing to find him qualified for enhanced retirement benefits based on his race in his First Amended Complaint, Plaintiff has offered no factual evidence or legal argument to support his claim of disparate treatment. Instead, Plaintiff simply recites statistics he believes supports his theory that Native Americans employed by the Department were not told of their eligibility to apply for enhanced retirement benefits. Because Plaintiff offers no evidence that the Department's explanation for denying his request for enhanced retirement benefits was pretext for discriminatory motives, the Court finds Plaintiff would be unable to persuade the trier of fact that he was intentionally discriminated against under a disparate treatment theory of liability. *See St. Mary Honor Ctr.*, 509 U.S.

at 511. Therefore, because Plaintiff is unable to make the requisite disparate treatment showing required under a Title VII, the Court finds the Department's request for summary judgment on this issue proper and grants such request.

B. Disparate Impact

Disparate impact claims challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480 (9th Cir. 1987). Unlike disparate treatment cases, "[i]llicit motive or intent is irrelevant because impact analysis is designed to implement Congressional concerns with the consequences of employment practices, not simply the motivation." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (quoting *Griggs*, 401 U.S. at 432) (internal quotations omitted). Instead, "the focus in a disparate impact case is usually on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993-94 (1988)).

To establish a *prima facie* case of disparate impact in a Title VII action, the plaintiff must: "(1) identify the specific employment practices or selection criteria being challenged; (2) show disparate impact; and (3) prove causation . . . ." *Id.* "Once the plaintiff establishes a *prima facie* case of disparate impact, the burden shifts to the defendant who may either

discredit the plaintiff's statistics or proffer statistics of his own which show that no disparity exists." *Id.* (citing *Watson*, 487 U.S. at 997). "The employer may also produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity." *Id.* "Thereafter, the plaintiff must show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." Id. (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)) (internal quotation omitted).

In his Memorandum Opposing the Department's Motion for Summary Judgment, Plaintiff's argument in support of his discrimination claim is limited to the following:

> Plaintiff has met [his *prima facie*] burden in that recent discovery . . . established that of the two hundred forty-eight (248) BIA employees listed in the 2004 Indian Forestry and Natural Resources National Directory, the vast majority of whom are Native American, with job descriptions qualifying for fire fighting status, only seventeen (17) have applied for and only one (1) employee has been approved for enhanced retirement benefits.
>
> Of all the many federal government employees qualifying for enhanced retirement benefits, only fourteen (14) Native Americans listed in the 2004 National Directory have even

> applied. This is credible prima facie evidence that discrimination is at play. The burden shifts to the Defendant to explain the disparity.

(Ct. Rec. 25 at 19-20.)

The above-stated comments, as well as those made with regard to Plaintiff's non-discrimination claim, seem to assert a belief that the Department's process for notifying employees of their eligibility to apply for enhanced retirement benefits has a disparate impact on Native American employees. Plaintiff appears to support this belief with statistics drawn from the 2004 Indian Forestry & Natural Resources National Directory ("National Directory") (Ct. Rec. __ Ex. 39) and answers provided by the Department to several interrogatories. (Ct. Rec. 28 at 58-62). Plaintiff's statistical analysis focuses on a list of 248 Bureau of Indian Affairs ("BIA") employees drawn from the National Directory and his belief that a "vast majority" of these 248 employees are not only Native Americans, but also qualified to applied for enhanced retirement benefits based on their fire fighting employment statuses. Because only seventeen of these 248 employees, fourteen of whom are Native Americans,[3] have applied for enhanced retirement benefits, Plaintiff deduces that the Department's enhanced retirement benefit notification practices have a disproportionately adverse impact on Native American employees.

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[3] In an interrogatory response, the Department confirms that fourteen of the seventeen noted employees are Native American. (Ct. Rec. 28 at 61.)

The Department counters Plaintiff's disparate impact argument by pointing to what it believes are flaws in Plaintiff's statistical analysis and ultimate conclusions. In course of doing so, the Department highlights Plaintiff's failure to support his claim that a "vast majority" of the 248 above-described employees are Native American and qualified to apply for enhanced retirement benefits. In addition, the Department emphasizes Plaintiff's failure to offer evidence that a lower proportion of qualified Native American employees have applied for enhanced retirement benefits than non-Native American employees. Lastly, the Department criticizes Plaintiff's failure to show any causal connection between its notification practices and any disparate impact suffered by its Native American employees.

As noted above, Plaintiff's first task in establishing a *prima facie* case of disparate impact discrimination is to identify the specific employment practice being challenged. *Rose*, 902 F.2d at 1424. Although not clearly stated, the Court finds Plaintiff has satisfied this requirement in that he is challenging the Department's failure to provide actual notice to all employees eligible to apply for the enhanced retirement benefits he now seeks.

Plaintiff's second task in establishing a *prima facie* case of disparate impact discrimination is to show the existence of an actual disparate impact between Native American employees and non-Native American employees. *See Id.* In doing so, Plaintiff must present sufficient statistical evidence to support

the finding of an actual racial disparity between the two classes of employees. Because, as discussed in greater detail below, Plaintiff has failed to submit sufficient evidence to prove the existence of the claimed racial disparity, he has failed to establish a *prima facie* case of disparate impact discrimination. *Id.* For this reason, the Department is entitled to judgment as a matter of law on Plaintiff's disparate impact theory of liability.

The statistics offered by Plaintiff fail to demonstrate the existence of a disparate impact for several reasons. First, Plaintiff's claim that a "vast majority" of the 248 employees referred to are Native Americans is unsupported. Although the names are drawn from the National Directory which includes contact information pertaining to employees working for the Bureau of Indian Affairs and numerous tribal government, no evidence has been submitted to prove a majority, or even a substantial portion, of those 248 individuals are Native American.

Second, Plaintiff's claim that "[o]f all the many federal government employees qualifying for enhanced retirement benefits, only fourteen (14) Native Americans listed in the 2004 National Directory have even applied" is misleading and also unsupported by the evidence. (Ct. Rec. 25 at 20.) In its interrogatory questions to the Department, Plaintiff limited its inquiry to a pool of 248 BIA employees pulled from the National Directory. (Ct. Rec. 28 at 15-57.) These questions resulted in answers from the Department, in which fourteen of the 248 employees listed by Plaintiff, were identified as persons who had

applied for enhanced retirement benefits and are Native American. *Id.* at 60-61. Because Plaintiff's statistics are based on answers relating to the limited pool of 248 employees selected by Plaintiff, it is deceiving to imply that only fourteen Native Americans, of all the Native Americans employed by the federal government, have applied for enhanced retirement benefits. Accordingly, the Court finds Plaintiff's conclusion over broad and impermissible in light of the Department's limited answer.

Despite the above-described deficiencies, even if the Court were to assume Plaintiff's statistical representations were true, i.e. only fourteen of all eligible Native American employees have applied for enhanced retirement benefits, Plaintiff has nonetheless failed to demonstrate the existence of any disparate impact or racial disparity between Native American and non-Native American employees. The Court reaches this conclusion based on Plaintiff's failure to compare the impact of the Department's notification practices on its Native American and non-Native American employees.

Plaintiff's representation that a relatively small proportion of Native American employees have applied for enhanced retirement benefits is meaningless in the context of a disparate impact analysis unless evidence is presented to show the proportion of Native Americans applying for the benefits is less than the proportion of similarly situated non-Native American employees applying for the benefits. Only by comparing the two classes respective application rates can a showing of

disparate impact be made. With no comparison, there is no showing Native Americans employees, such as Plaintiff, have been more harshly affected by the complained of employment practice than any other racial class of employees. Thus, because no showing has been made that a lower proportion of Native Americans employees have applied for enhanced retirement benefits than similarly situated non-Native American employees, Plaintiff has failed to demonstrate the existence of a disparate impact and for this reason, Plaintiff may not recover under this theory of liability.

IV. Conclusion

Because Plaintiff has presented insufficient evidence to survive summary judgment on his either of his two theories of Title VII liability, the Court grants summary judgment in favor of the Department on Plaintiff's discrimination claim and hereby dismisses this case.

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Accordingly, IT IS **HEREBY ORDERED**: Defendants' Motion for Summary Judgment **(Ct. Rec. 18)** is **GRANTED** (discrimination claim). Summary judgment in awarded in favor of Defendants on all claims brought against them by Plaintiff.

IT IS SO ORDERED. The District Court Executive is directed to:

(A) Enter this Order;

(B) Enter judgment in favor of Defendants on all claims alleged by Plaintiff in this action;

(C) Provide copies of this Order and the Judgment to Plaintiff and defense counsel; and

(D) Close this file.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide a copy to counsel.

DATED this 28th day of March, 2006.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge